IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12592 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUSTAK KHAN ISMAIL ALI KHAN

Versus

STATE OF GUJARAT

Appearance:

MS BANNA DUTTA for Petitioner

MS MITA PANCHAL AGP for Respondent No. 1 & 3

MS PJ DAVAWALA for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 19/09/2003

ORAL JUDGEMENT

1. This Special Civil Application has been filed by the petitioner challenging an order passed by the Additional Chief Secretary to Government of Gujarat, Home Department, Gandhinagar, on 8th of November, 2002, in

exercise of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act for short) directing the detention of the petitioner in pursuance of Section 5 of the COFEPOSA Act, 1974. The petitioner was actually detained in pursuance of this order on 20.11.2002.

2. The grounds served upon the detenu petitioner and as has been placed on record point out following facts.

The petitioner is a holder of Indian Passport bearing No. M-889304 issued on 3.12.1992 valid upto 2nd of December, 2002. The incident in question occurred on 16.8.2002 and on that day the petitioner was to travel to Sarjah from Sardar Vallabhbhai Patel International Airport, Ahmedabad, in Flight No.IC-563. The petitioner was holding ticket booklet, United Arab Emirates Entry Permit, etc. The petitioner checked in at the Airlines counter for boarding the flight and also obtained boarding pass and seat number of the aircraft. The petitioner passed through the immigration, the customs and security check. After that, the petitioner was waiting in a waiting hall to board the aircraft. At that juncture, on the basis of specific information , the Officers of Directorate of Revenue Intelligence, Ahmedabad, intercepted the petitioner at the waiting hall. Upon inquiry and after some hesitation, the petitioner admitted that he was concealing foreign currencies in his body. The petitioner was immediately taken to the Office of Directorate of Revenue Intelligence at Ahmedabad for ejecting the foreign currencies which was concealed by the petitioner in his body. During the period from 16.8.2002 to 19.8.2002, the petitioner ejected 85 small capsules and one big capsule consisting of US $ 18,300, UAE Dirham - 99,000 and Qatar Rial 11,5000, worth Indian Rs.23,58,288.60 at the exchange rate prevailing on 19.8.2002. The said foreign currency, as per the provisions of the Customs Act, 1962 were seized in the presence of panchas because the same was being smuggled out of India by concealing the same in the body of the petitioner. The petitioner revealed before the Deputy Director, Directorate of Revenue Intelligence, Ahmedabad, that the petitioner had on 16.8.2002 boarded Indian Airlines Flight at 5.00 p.m. from Mumbai to Ahmedabad and thereafter from Ahmedabad the petitioner was to board Indian Airlines Flight to Sarjah at 9.10 p.m. on 16.8.2002. The petitioner, as aforesaid, had concealed the foreign currencies in his body by swallowing the capsules containing the foreign currency and one big such capsule was injected in the body of the petitioner though his anus. The currency was

to be smuggled as above said out of the country and was given to the petitioner by one Shri Rajubhai of Mumbai. The petitioner had met Shri Rajubhai on Gulf Air Flight from Mumbai to Dubai in the month of May, 2002. At that time, the petitioner was on visit to his brother-in-law staying at Dehra, Dubai. On the said flight, the petitioner got acquainted with said Rajubhai. Thereafter, when petitioner returned from Dubai around 24/25th May, 2002, Rajubhai contacted the petitioner on his residence telephone and asked for a meeting. Rajubhai on meeting with the petitioner, made a proposal that if petitioner smuggles out foreign currency, Rajubhai would pay the petitioner Rs.5,000/- per trip and bear all the travelling expenses. Rajubhai convinced the petitioner that the petitioner was to earn by this proposal not only cash but free visits to UAE also. The petitioner agreed to the proposal floated by Rajubhai. Thereafter, in first week of June 2002, said Rajubhai took the petitioner to Dubai to meet one Shri Aslambhai and Aslambhai accordingly at his residence at Dehra, Dubai, was introduced to the petitioner by Rajubhai. Around 15th of July, 2002, Rajubhai contacted the petitioner again and asked him to meet at Greenfield Hotel near Mazgaon Circle. Rajubhai also informed the petitioner that the visa of the petitioner to Dubai was arranged and the petitioner was to take along with him foreign currencies by smuggling to Dubai. The petitioner was informed that the currency would be packed in capsules which were required to be consumed by the petitioner orally and after reaching Dubai, on defecating the capsules, were to be recovered by the petitioner from his stools. The said capsules containing foreign currencies was thereafter to be entrusted to Aslambhai. On or around 23.7.2002, Rajubhai informed the petitioner that he was to go to Dubai on 25.7.2002. On 25.7.2002, Rajubhai came to pick the petitioner at 7.00 a.m. and in his Maruti Van took him to Worli Seaface and gave petitioner 65 capsules and asked the petitioner to swallow the same. The petitioner swallowed the said capsules. That 65 capsules contained foreign currencies around Rs. 15 lacs. Rajubhai thereafter dropped the petitioner at Mumbai International Airport from where the petitioner boarded Air India Flight at 2.30 p.m. to Dubai. On reaching Dubai, Shri Aslambhai received the petitioner and took him to Hotel Al-Khail Inn. The petitioner after taking food and smoking cigarettes, passed stools on newspapers and recovered the capsules swallowed by him orally containing foreign currencies and after cleaning those capsules, the same were entrusted to Aslambhai. On the night of the same day, as arranged by Aslambhai, the petitioner returned to Mumbai through

flight. Again, in the first week of August, 2002, Rajubhai contacted the petitioner, arranged visa, and informed him to be ready to smuggle out foreign currencies. Rajubhai met the petitioner at Sai Shradha Bar, Mazgaon Circle, Mumbai, on 15.8.2002 and gave the petitioner 85 capsules and one big capsule of battery size containing foreign currencies. Rajubhai informed the petitioner that the petitioner was to board Sarjah flight from Ahmedabad and from Mumbai to Ahmedabad the petitioner was to travel through Indian Airlines flight. The travel from Ahmedabad to Mumbai to Sarjah, according to Rajubhai, was to take place on 16th of August, 2002. As instructed, the petitioner consumed 85 capsules in the morning of 16.8.2002 and injected one battery size capsule through his anus. All these capsules contained foreign currencies. On 16.8.2002, around 3.00 p.m. Rajubhai picked the petitioner from his residence and dropped him at Mumbai domestic airport. From there petitioner, through flight landed at Ahmedabad around 5.00p.m. On reaching Ahmedabad Airport, the petitioner cleared all the boarding formalities and got the boarding pass on Indian Airlines Flight to Sarjah, and as above said, on trap being laid, the petitioner was caught while he was waiting to board the above said flight. The petitioner came to be arrested under the provisions of the Customs Act on 19.8.2002 and a prosecution came to be launched against the petitioner. The proposing authority moved the proposal for detention of the petitioner under the COFEPASA Act. The proposing authority first placed the material before the Screening Committee. The meeting of the Screening Committee convened on 24.9.2002 and it was decided that the petitioner be detained under the COFEPASA Act. Therefore, the proposing Authority on 4.10.2002 moved the detaining authority and placed all the material for perusal and screening and to pass appropriate orders by detaining authority. The detaining authority is the Additional Chief Secretary, Home Department, Govt. of Gujarat. In the meanwhile, in the prosecution launched against the petitioner under the Customs Act, the petitioner preferred bail application on 3.9.2002, before the Chief Metropolitan Magistrate, which came to be rejected on the same day. The petitioner thereafter preferred bail application before the City Sessions Court at Ahmedabad, which also came to be rejected on 8.10.2002. But since, the charge sheet could not be filed within the prescribed time by the Code of Criminal Procedure, the petitioner came to be released on bail on 23.10.2002 by the Chief Metropolitan Magistrate Court at Ahmedabad. So, as aforesaid, when the proposing authority forwarded the material to the detaining authority on 4.10.2002 and the matter was under

consideration and when the bail order dated 23.10.2002 came to be passed, the same also was submitted before the detaining authority. The Additional Chief Secretary, Home Department, the detaining authority, received all the material, as aforesaid through proper channel on 31.10.2002. After due scrutiny of all the relevant records placed before him and after carefully going through the material on record, the detaining authority i.e. Additional Chief Secretary, Home Department, Govt. of Gujarat, recorded his subjective satisfaction on 7.11.2002 and decided to pass the order of detention under COFEPASA against the petitioner. The order impugned therefore came to be passed on 8.11.2002. The said order is under serious challenge by this Special Civil Application.

3. Learned Advocate Ms. Banna Dutta for the petitioner, learned AGP Ms. Mita Panchal for respondents No. 1 and 3 and learned Addl. Central Govt. Standing Counsel Ms.P.J.Davawala for respondent No.2 were heard at length. Affidavit-in-reply and additional affidavit of the Under Secretary to Government of Gujarat, Home Department, rejoinder filed by the petitioner, sur-rejoinder filed on behalf of the respondent No.1 i.e. Deputy Secretary, Govt. of Gujarat, Home Department, and all the relevant records available with this court were taken into consideration. Learned Advocate for the petitioner has advanced in all four contentions against the order impugned. Each contention is discussed and decided one by one, as under.

4. The first contention which was advanced by the learned Advocate for the petitioner was in respect of passing the order of detention with delay. It was vehemently contended that the so called incident occurred on 16.8.2002. The statement of the detenu was recorded on 19.8.2002. Proposal to the Screening Committee was made by the proposing Authority on 3.09.2002. The Screening Committee heard the proposal on 24.9.2002 and thereafter the order of detention was passed on 8.11.2002 by the Addl. Chief Secretary, Home Department, Govt. of Gujarat, the same being the detaining authority. It was urged that in the cases of preventive detention, the purpose of detention itself would be frustrated if the order is passed with delay. In this case, according to the submission made by the petitioner, there is a delay of 3 months in passing of the order from the date of the alleged incident. This delay, though affidavit is filed, on behalf of the State Government, is not properly explained and merely dates are mentioned. Therefore, it was urged that the order passed is required to be quashed

on this ground alone. Learned Advocate for the petitioner has placed reliance on a decision of the Apex Court in the matter of RAJESH GULATI vs. GOVT. OF NCT OF DELHI AND ANOTHER, as reported in 2002 AIR SCW 3563, and a decision of the Division Bench of this Court in the matter of ARJAN GAGA SHIYAL (THE DETENU) VS. THE STATE OF GUJARAT AND ANOTHER, reported in 1987 (1) CRIMES, 531. As against that, learned AGP Ms. Panchal after drawing the attention of this Court on affidavit-in-reply filed by the Deputy Secretary to the Govt. of Gujarat, Home Department, urged that mere delay is not fatal for the order of detention. According to learned AGP, the delay is well explained in the affidavit filed by Shri G.R. Rajput, Under Secretary to Govt. of Gujarat, on 24.4.2003 vide para 5, point No.10 of the affidavit, which is on record. It was urged that after the incident, the investigation was carried on at both the places at Ahmedabad and Mumbai. The proposal to the Screening Committee was sent by the Commissioner of Customs, on 3 December 2002. The Screening Committee could meet only on 24.9.2002 and decided the matter. Thereafter on 4.10.2002, the papers were submitted to the Addl. Chief Secretary, Home Department, which was received by the Addl. Chief Secretary through the movement of files on 31.10.2002 and after due consideration, the order came to be passed on 8.11.2002. Therefore, as urged by learned AGP, according to her, there is no delay at all and if the delay is caused, the same is explained, as aforesaid. Learned AGP has placed reliance on a decision of the Apex Court in the matter of RADHAKRISHNAN PRABHAKARAN vs. STATE OF T.N. AND OTHERS, as reported in (2000) 9 SCC 170 and a decision of the Apex Court in the matter of RAJAN WORLIKAR vs. STATE OF KARNATAKA & ORS., as reported in (2001) 5 SCC 295, and a decision of this Court in the matter of HARISH ANAND vs. UNION OF INDIA & ORS., as reported in 1996 (1) GLR 197.

5. Having regard to the rival contentions in this respect and evaluating the contentions raised, it must be borne in mind that mere delay in passing the order, would not vitiate the order on account of delay. The law as it stands today is when delay if at all occurred and if not explained, vitiates the order. Therefore, in each case, when delay is contended as a ground for quashing the detention order, careful screening of the facts and circumstances of each case has to be undertaken and while going through this exercise, the Court has to be pragmatic and must scrutinize the circumstances with a eye of realities of life. As revealed from the record, true it is that, the incident occurred on 16.8.2002 and the order of detention came to be passed on 8.11.2002. A

look on surface of this fact certainly would give an impression that the delay of three months are caused in passing of the order and, therefore, the facts are required to be scrutinized with an eye of reality. The affidavit-in-reply which is filed by the Under Secretary of the Govt. of Gujarat, Home Department, reveals that the proposal to Screening Committee was moved by the Customs Department on 3.9.2002. The Screening Committee consists of the members of different departments, practical difficulty to convene the Screening Committee must not be lost sight off. The members of the Committee consists the State Government representatives, Central Government representatives and Officers of the Customs Department and, therefore, the Committee could be convened only on 24.9.2002. This delay cannot be attributed to in-action to the extent of vitiating the order impugned in this petition. Thereafter also, as soon as the Committee recommended the detention of the petitioner, right on 4th of October, 2002, the Addl. Secretary in the Home Department of the State Government was moved by the Customs Authorities vide letter. The files of the Department reveal that the Officers of the Customs Department and DRI were prompt enough to move the proposal by personal delivery. In consultation with the Home Department, it was deduced by proposing mechanism that the material which is supposed to be placed before the detaining authority, requires five sets of attested documents and that too in translation in the languages English, Gujarati, Arabic and Marathi. In consultation, it was also deduced that it was also advisable to have copy of the x-ray of the petitioner to place before the detaining authority. It was also deduced that the State Government was required to be informed of latest development with regard to the bail application and therefore by no stretch of reasoning, it could be said that when file with all material reached to the Addl. Secretary, Home Department - the detaining authority on 31.10.2002, there was any such delay, which would vitiate the order of detention. The detaining authority thereafter, as mentioned in the affidavit-in-reply, gone through the material placed before him carefully and reached to the subjective satisfaction on 7.11.2002 and consequently the order came to be passed on 8.11.2002. If we carefully peruse the procedural mechanism right from 19.8.2002, the day on which the statement came to be recorded of the petitioner and panchnama was drawn till 8.11.2002, it is not found that the prompt action was not taken by the authority concerned. Therefore, the principle of law is, the time gap is never material to attribute delay in passing of the order. There may be causes contributing the delay and those causes may not be

the causes to quash the order and on the contrary those causes may appeal to the court that there may not be any other alternative except to proceed the mechanism as it might have proceeded with. It is useful in this respect to quote the observation of this Court in the matter of Harish Anand vs. Union of India (supra) wherein the delay of 13 months in passing of the order of detention on facts was not considered fatal by this Court. The paras 15, 17 and 23 of the said decision are as under:

"15. In the case of Rajendrakumar Natwarlal Shah v. State of Gujarat & Ors., AIR 1988 SC 1255, the Supreme Court has emphasized and made it clear for the guidance of different High Courts that a distinction must be drawn between the delay in making of detention order under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Art. 22(5) of the Constitution. The Supreme Court has highlighted the principle that in the cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering, who owing to their resources and influence, have been posing a serious threat to the economy and thereby to the security of the nation, the Courts should not merely on account of delay in making of an order of detention assume that, such delay if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. The Supreme Court has further cautioned that taking of such view would not be warranted unless the Court finds that the grounds are stale or illusory or that there is no real nexus between the grounds and the impugned order of detention. The pertinent observations which have been made by the Supreme Court are to be found in para-9 of the reported judgment of the Supreme Court which are as under :

"In the enforcement of a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling

Activities Act, 1974 there is apt to be some delay between the prejudicial activities complained of under Sec. 3(1) of the Act and making of an order of detention. When a person is detected in the act of smuggling or foreign exchange racketeering, the Directorate of Enforcement has to make a thorough investigation into all the facts with a view to determine the identity of the persons engaged in these operations which have a deleterious effect on the national economy. Quite often these activities are carried on by person forming a syndicate or having a wide network and, therefore, this includes recording of statements of persons involved, examination of their books of accounts and other related documents. Effective administration and realisation of the purpose of the Act is often rendered difficult by reason of the clandestine manner in which the persons engaged in such operations carry on their activities and the consequent difficulties in securing sufficient evidence to comply with the rigid standards, insisted upon by the Courts. Sometimes, such investigation has to be carried on for months together due to the magnitude of the operations. Apart from taking various other measures, i.e. launching of prosecution of the persons involved for contravention of the various provisions of the Acts in question and initiation of the adjudication proceedings, the Directorate has also to consider whether there was necessity in the public interest to direct the detention of such person under Sec. 3(1) of the Act with a view to preventing them from acting in any manner prejudicial to the conservation and augmentation of foreign exchange or with a view to preventing them from engaging in smuggling of goods etc. The proposal has to be cleared at the highest quarter and is then placed before a Screening Committee. For ought we know, the Screening Committee may meet once or twice a month. If the Screening Committee approves of the proposal, it would place the same before the detaining authority. Being conscious that the requirements of Art. 22(5) would not be satisfied unless the basic facts and materials which weighed with him in reaching his subjective satisfaction, are communicated to the detenu and the likelihood that the Court would examine the grounds specified in the order of detention to see whether they are relevant to the circumstances

under which the impugned order was passed, the detaining authority would necessarily insist upon sufficiency of the grounds which would justify the taking of the drastic measure of preventively detaining the person."

"17. The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. It is a subsidiary test evolved by the Court for the purpose of determining the main question whether the past activity of the detenu is such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far as it subserves that purpose and it cannot be allowed to dominate or drown it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organized operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in future.

"23. From the facts of the case and more particularly the grounds of detention, it is apparent that the detaining authority was aware of the fact that some time had elapsed between the date of incident and the date of passing of the detention order and yet it is indicated in the grounds that the detaining authority formed subjective satisfaction that having regard to the prejudicial activities attributed to the detenu, it was necessary to detain him with a view to preventing him from engaging in transporting smuggled goods. Para 14 of the grounds of detention reads as under :

" I am also satisfied that there is no delay in initiating action under the COFEPASA Act, 1974 and that the nexus between the date of incident and the passing of this detention order as well

as the object of your detention has been maintained."

"In my opinion, time-lag between the date of alleged incident and the date of making of detention order cannot be treated as so large that it can be said that no reasonable person could possibly arrive at the satisfaction which the detaining authority did on the basis of the material placed before it. Delay in making the order of detention was not occasioned by any laxity on the part of the sponsoring authority or detaining authority, but was result of full and careful consideration of the facts and circumstances of the case. The allegations of transport of smuggled goods levelled against the detenu from their very nature are continuous ones and not limited or restricted to any particular period and, therefore, delay in ordering detention would not snap time between the prejudicial activities and the purpose sought to be achieved by order of detention. As noted by the Supreme Court in the case of Rajendrakumar N.Shah (supra) some time is bound to elapse before investigation of the alleged incident is completed and the matter is brought to the notice of the detaining authority and the detaining authority applies its mind and arrives at requisite satisfaction culminating into order of detention. The delay in passing the order of detention is satisfactorily explained by the sponsoring authority and the detaining authority. Having regard to the explanation offered by the sponsoring authority as well as on behalf of the detaining authority, it cannot be said that period of about 13 months which lapsed between the date of alleged incident and the date of making of order of detention, has in any manner vitiated subjective satisfaction of the detaining authority or indicates that the satisfaction was colourable or no satisfaction at all was formed as required by the statute. The satisfaction which the detaining authority is required to reach in order to support the detention order is that it is necessary to detain the petitioner with a view to preventing him from engaging in transporting smuggled goods and that satisfaction can obviously be founded only on reasonably anticipated prognosis of future behaviour of the petitioners made on the basis of past incidents referred to in the grounds of detention. The

manner in which the petitioner transported 181 packages or contraband ball bearings from Jamnagar to Delhi indicating deep rooted conspiracy would be sufficient to satisfy the detaining authority about the need to detain the petitioner. It is not possible to say that the incident referred to in the grounds of detention was such that it could not reasonably lead to the satisfaction which the detaining authority reached when it made detention order. In my view, passage of time between the date of incident and the date of making of the order of detention is result of full and detailed consideration of facts and circumstances of the case after thorough examination at various levels and, therefore, it cannot be said that the detention was in any way illegal when the detaining authority had fully and satisfactorily applied its mind to the question of detention order. The grounds of detention are neither stale nor illusory. There is real nexus between the grounds and the impugned order of detention. The detention order, therefore, in my opinion, is not liable to be quashed and set aside on the ground that there is delay in passing the order of detention."

Likewise, the Apex Court in the matter of Rajan Worlikar vs. State of Karnataka and Ors (supra), as noted above, in para 10 observed as under :

"10. The learned counsel for the appellant next submitted that there is delay in making the order of detention and, therefore, the same is illegal and void. For this purpose, he submitted that the appellant was arrested on 8.11.1996 and the detention order was passed after nearly 5 months i.e. on 15.4.1997. In our view, this contention is rightly rejected by the High Court as the detaining authority has sufficiently explained the reasons for the said delay. The explanation given for the delay is also mentioned in para 4(C) of the counter-affidavit filed on behalf of the Union of India. Considering the facts stated therein, in our view, the High Court has rightly rejected the said contention."

6. In this case it is revealed that the investigations were conducted at Ahmedabad and Mumbai. There was no regular Additional Director posted at DRI,

Ahmedabad during relevant period, the files had to be sent to the Additional Director, DRI, Mumbai. Thereafter, on 3.9.2002 proposal was sent to the Commissioner of Customs, Ahmedabad for convening meeting of Screening Committee. From 24.8.2002 to 25.8.2002 and 30.8.2002 to 1.9.2002 were closed holidays. As the members of the Screening Committee consists of Officer of different departments it could meet on 24.9.2002. The proposal was personally handed over to Home Department of the State Government. It was asked by the Home Department of State Government to provide the set of attested/certified documents along with the attested copies of translation in English of the documents which were in Gujarati/Marathi/Arabic languages and progress report regarding bail application and orders of the Court. This exercise certainly denotes human efforts and is likely to take some time. Ultimately, documents as discussed and advised were submitted to the Home Department on 24.10.2002 which was received by the Home Department on 25.10.2002. All the relevant documents including bail order dated 30.10.2002 were placed before Detaining Authority. Detaining Authority, certainly was likely to take some time. The above chronology emanates vigilance and promptness on the part of all concerned and only unavoidable time gap.

7. From the above, it is clear that the delay of three months caused in this case is sufficiently explained in the affidavit-in-reply filed by the Under Secretary to the Govt. of Gujarat, the decision of this Court as cited by the learned Advocate for the petitioner i.e. in the case of Arjan Gaga Shiyal vs. State of Gujarat (supra), the delay was on account of getting the documents cyclostyled. The explanation given in that was really an apology which the court did not consider to be an explanation and observed that such an explanation can hardly be regarded as sufficient for the purpose of justifying delay and, therefore, in that case, in fact there was delay and there was no explanation at all for unreasonable delay. The ratio laid down in the said decision would not help the petitioner. The contention that the order is bad in law on account of delay in passing the order, is required to be negatived.

8. The second contention advanced is in respect of repetitive tendency of the petitioner. It was submitted that the passport of the petitioner was seized by the Customs Department. When the passport was seized, according to the learned Advocate for the petitioner, the question of going abroad by the petitioner, would not arise and to indulge in smuggling activity also cannot be

presumed or assumed. Para 10 of the grounds served upon the detenu clearly reveals that the passport was seized by the Customs officials and on the ground that the petitioner was likely to be indulged in smuggling activities, the order of detention came to be passed. In this respect, learned Advocate for the petitioner relied upon a decision of the Apex Court in the matter of RAJESH GULATI vs. GOVT. OF NCT OF DELHI AND OTHERS, as reported in 2002 AIR SCW 3563. In para 15, the Apex Court was pleased to observe as under :

> " In other words, according to the detaining authority the prime mover for the smuggling activity was the proprietor of M/s B.D. Denim. The appellant at the worst was a pawn in the hands of another. The likelihood of the appellant indulging in smuggling activities by the appellant was in any case effectively foreclosed by the retention of his passport by the customs department. The detaining authority noted that the appellant's passport was with the customs department and yet he said "but you are likely to travel clandestinely for the purpose of smuggling". Now none of the instances of smuggling by the appellant as stated in the impugned detention order describe the appellant was having travelled without a passport for the purpose of smuggling. The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority. These findings are sufficient to invalidate the impugned detention order and it is not necessary to consider the other issues raised by the appellant."

9. Learned AGP contesting the contention, submitted that even after the passport was seized, the apprehension on the part of the detaining authority about indulging in smuggling activities was genuine. It was contended that if the history revealed by the grounds is scanned, it is clear that there were earlier incidents of smuggling as stated by the petitioner himself. The incident is of a serious nature and one Mr. Rajubhai of Mumbai alleged to have been involved with the petitioner. Even after due investigation, there is no trace of the said Rajubhai. The circumstances of the case, according to learned AGP, are was compelling in the nature that even after the seizure of passport, the apprehension on the part of the detaining authority that the petitioner might indulge in

other activities of foreign currencies in breach of law could not be ruled out. The learned AGP has placed reliance on the decision of the Apex Court in the matter of ABDUL SATHAR IBRAHIM MANIK vs. UNION OF INDIA, as reported in AIR 1991 SC 2261 and a decision of the Apex Court in the matter of MADAN LAL ANAND vs. UNION OF INDIA, as reported in AIR 1990 SC 176.

10. Evaluating rival contentions in this respect, it is necessary to refer to the grounds of detention served upon the petitioner. After narrating of the facts and reaching to the subjective satisfaction, in para 10, the detaining authority reached to the satisfaction as under:

> "I am aware that departmental adjudication proceedings and prosecution under the Customs Act, 1962 are likely to be initiated against you in due course to decide your penal liability. I am also aware that your passport is likely to remain with the authorities of DRI, Ahmedabad till the completion of likely prosecution proceedings against you under the Customs Act, 1962. As this proceedings would be punitive in nature and members of witnesses are to be examined, the said proceedings would consume a considerable time."

Now, whether person possess a repetitive tendency to commit alleged act is a complex question to be decided and always it depends upon the facts and circumstances of each case. The crux of the matter is whether the subjective satisfaction of the detaining authority in this respect was based on material or not and secondly whether reasonable inference could have been drawn from the material placed before the detaining authority that in given set of circumstances, a person in future may or may not indulge in activities, for which the preventive law is proposed to be invoked. It is necessary therefore to refer to the observations of the Apex Court in the case of ABDUL SATHAR IBRAHIM MANIK vs. UNION OF INDIA (supra). Though this is a case wherein a foreign national holding the passport of some other country, came to be detained under preventive detention law. His passport was also seized by the concerned authority. After going through the various case laws of the Apex Court in the said decision of the Abdul Sathar Ibrahim Manik (supra), in para 12, the Apex Court was pleased to set out certain principle of law as under :

> " Having regard to the various above-cited decisions on the points often raised we find it appropriate to set down our conclusions as under:

(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition, the same can be questioned before a higher court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in judicial custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending

upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the ground, which aspect can be examined by the Court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. "

When person is under custody it is ordinarily presumed that since the movement of a person is not free, there would not be any opportunity to the said person to repeat his past behaviour. The Supreme Court observed that if the movement of a particular person is restricted even by judicial custody, detaining authority may pass the detention order on reaching to proper subjective satisfaction especially when there should be compelling necessity to pass the detention order even if the detenu is in custody and his movements are restricted. Like wise, in the present case, though the passport of the detenu is seized by the Customs officials and to that extent the liberty and free movement of the petitioner is restricted. The detaining authority on material placed before him has passed the order of detention. Having gone through the facts of this case, the way in which the foreign currency in past was exported and was being exported, when intercepted by the authorities, the apprehension based on material placed before the detaining authority, in respect of repetitive tendency, cannot be held unjustifiable as to quash the order of detention on the said ground. The allegation against the petitioner is to be instrumental in exporting and dealing in foreign currency. The allegation is not only to the extent that exporting and dealing in foreign currency only after leaving the country. In my view, this factor was compelling circumstances for the detaining authority to pass the order of detention even though the passport was seized by the Customs authorities. In the other decision of the Apex Court as cited by the learned AGP in the matter of Madan Lal Anand vs. Union of India (supra), the Supreme Court was pleased to observe that even though the import licence of the petitioner in the said petition was cancelled, the detenu was likely to indulge in the activities against law. Paras 39 and 40 of the said decision are as under :

"39. Lastly, it is argued that the life of each of the advance licences has long expired and therefore there is no chance of the detenu in involving himself in smuggling activities, as he would not be in a position to import any goods by virtue of the advance licences. It is submitted that the object of such detention is not punitive, but is preventive. As there is no chance for the detenu to act in violation of the Provisions of the COFEPOSA Act, the detention order should be quashed on that ground.

40. In support of that contention strong reliance has been placed on behalf of the detenu on a decision of the Delhi High Court in Achla Kakkar v. Administrator, Union Territory of Delhi, 1988 Cri. LJ 1896, where it has been observed that the recurrence of breach of such economic offences can be effectively prevented by black listing the person concerned, his detention under the COFEPASA Act was in the nature of punishment liable to be quashed. In that case also, the detenu imported polyester zips and sold the same in the market without complying with the conditions of the advance licences. There is, however, an important point of distinction between the facts of that case and those of the instant case before us. In that case, the licences were issued in the name of the detenu himself. But here the licences were issued not in the name of the detenu, but to the name of the said two firms which, according to the detaining authority, had really no existence and were the benami concerns of the detenu. It is contended by Mr. Mahajan, learned Counsel appearing on behalf of the respondents that if the detenu is released, he may indulge in such economic offences in setting up fictitious firms and taking out advance licences in the name of such firms."

11. From the above, it is clear that it is not the rule of law that when person is in the custody or his movements are restricted, his past activities could not be repeated by the detenu. As observed above, this is a question of facts and circumstances of each case, whether in given set of circumstances the detenu was likely to repeat his past behaviour. Having regard to the grounds which is placed on record and having regard to the statement which the detenu offered before the Customs

Authorities, it is clear that even if the passport of the petitioner is seized, the petitioner was likely to indulge or would tempt to indulge in the activities alleged against him. Further, the grounds reveal the earlier incidents and the acquittance of the petitioner with one Rajubhai who is not traceable and one Aslambhai, resident of Dubai. The decision cited by learned Advocate for the petitioner in the matter of Rajesh Gulati (supra) discloses facts wherein the detenu was indulged in the smuggling activities at the instance of some one else and what was seized from him were some mobile phones, worth Rs. 5,60,000/-. In the above said fact, the detaining authority in that case, reached to the subjective satisfaction that "but you are likely to travel clandestinely for the purpose of smuggling." Therefore, the Supreme Court observed that firstly the prime mover for the smuggling activity was the proprietor of M/s B.D. Denim and not the detenu. Secondly, the detaining authority reached to the subjective satisfaction about clandestinely travelling by the detenu on no material because there was no such past record and, therefore in this case having regard to the peculiar facts and circumstances it could not be said that since the passport of the detenu is seized, there was no purpose in invoking the preventive detention law to prevent the illegal activities of the petitioner. On the contrary, reading as a whole, the grounds placed on record, in para 10 of the grounds, which is based on the previous incidents, reveal genuine apprehension on the part of the detaining authority to invoke the preventive detention law even though the passport of the detenu was seized by the Customs Department. The volition of the detenu to instrumental to deal with foreign currency may have more facades. One of that may be dealing in foreign currency illegally, which activity would not require passport. what is important is the ready volition of the detenu as disclosed from the grounds to deal in foreign currency, and that circumstance, in the satisfaction of the detaining authority, was likely to be repetitive tendency on the part of the detenu. The subjective satisfaction of the detaining authority is not vitiated on this ground for the above said reasons. This contention therefore on behalf of the petitioner is negatived.

12. The third contention which advanced on behalf of the petitioner is in respect of delay in dealing with the representation of the petitioner by the State Government as well as by the detaining authority. The admitted facts which are on record clearly indicates that the petitioner preferred representation after his detention

on 16.12.2002 addressing to following authorities.

1. The State of Gujarat
(Notice to be served through
The Additional Chief Secretary
Home Department (Special)
Sachivalaya, Gandhinagar.

2. Union of India
Notice to be served through
Joint Secretary (COFEPOSA)
Government of India
Ministry of Finance
Department of Revenue
C.E.I.B., Janpath Bhavan
6th Floor, "B" Wing, Janpath
New Delhi 110 001.

The said representation was received by the concerned department i.e. Home Department on 16.12.2002. It was processed on 17.12.2002. It passed through Deputy Secretary, Addl. Chief Secretary, Home Minister and ultimately the Chief Minister. The affidavit-in-reply filed denotes that upto the Addl. Chief Secretary level, the file was cleared on 18.12.2002 and was left with the Office of the Home Minister. However, the same ultimately came to be decided by the Chief Minister on 23.12.2002. Therefore, the contention that the representation of the detenu was not promptly attended by the authority concerned and there is no explanation at all after 18.12.2002 to 23.12.2002 that why these five days lapsed without attending the representation of the petitioner, the order impugned is required to be set aside because right of detenu for effective representation is affected. In this respect, learned Advocate for the petitioner relied upon a decision of the Apex Court in the matter of KUNDANBHAI DULABHAI SHAIKH vs. DISTRICT MAGISTRATE, AHMEDABAD AND OTHERS, as reported in (1996) 3 SCC 194 to make good the submission that the representation of the detenu has to be disposed of at the earliest and if there has been any delay in the disposal of the representation, the reasons for the delay must be indicated to the court or else the unexplained delay or unsatisfactory explanation in the disposal of the representation would fatally affect the order of detention. A decision of the Division Bench of this Court in Letters Patent Appeal No. 775/2003 in Spl. C.A. No. 9 of 2003, delivered on 11.9.2003, has also been relied upon, wherein in para 6, the Division Bench from the facts of that case came to the conclusion that there was no explanation offered in the affidavit-in-reply filed by the Deputy Secretary to the

Government, Home Department as to which steps were taken on December 26, 2002 after it was received by the Department. No explanation could be offered as to why the same could not be placed before the Under Secretary on December 26 or 27th December, 2002. The court came to the conclusion that this unexplained delay was fatal to the detention order. The contention in this case therefore is that no sufficient explanation about the delay caused between 18.12.2002 to 23.12.2002 is offered by the respondent, this delay is fatal as per law for the detention order. In this respect, offspring contention is also required to be looked into. This contention is based on two decisions of the Apex Court, namely, (i) decision of the Constitutional Bench of the Apex Court in the matter of KAMLESHKUMAR ISHWARDAS PATEL vs. UNION OF INDIA AND OTHERS, reported in (1995) 4 SCC 51, and (ii) MOOSA HUSEIN SANGHAR vs.STATE OF GUJARAT AND OTHERS, reported in 1993 (1) GLH 923. In the case of Kamleshkumar Ishwardas Patel (supra), Constitutional Bench of the Supreme Court after taking into consideration, Section 11 of the COFEPASA Act ruled that in addition to the Central Government, Officer especially empowered by the Central Government, the State Government, the detaining authority also can revoke the order passed under the COFEPASA Act. The Supreme Court observed that this is so because the Section 11 clearly indicates that without prejudice to the provisions of Section 21 of the General Clauses Act, 1897, the State Government, the Central Government, the Officers of the State Government and the Officers of the Central Government shall have power to revoke or modify the order of detention. The Supreme Court observed that Section 11 of the COFEPASA Act is without prejudice to the provisions of Section 21 of the General Clauses Act, 1897. Meaning thereby that the detaining authority who passed the order, under the General Clause Act, will have power to revoke or modify the same in addition to the authorities mentioned in Section 11 of the COFEPASA Act. Therefore, the Supreme Court ruled that when a representation is made to the detaining authority, the detaining authority cannot without considering independently the representation of the detenu, forward the same to the State or Central Government. The Supreme Court ruled that non-consideration of the representation by the detaining authority when it is submitted to him by the detenu would amount to breach of the constitutional rights of the detenu under Article 22(5) of the Constitution of India. In the case of Moosa Husein Sanghar (supra), wherein the Supreme Court observed that when the detenu addressed the representation to the Advisory Board through the Government, it was incumbent

upon the State Government to have considered the said representation and it could not return the same to the appellant without considering it on the ground that it was not addressed to it but was addressed to the Advisory Board. Relying on this observation of the Apex Court in the above two decisions, the offspring contention in this case is though the representation was addressed to the State Government but the detaining authority was required to consider the representation independently and non-consideration of the representation by the detaining authority, violates the constitutional guarantee enshrined in Article 22(5) of the Constitution of India and the order is required to be set aside on this ground. To this contention, learned AGP drawn the attention of the court on the affidavit filed by the Deputy Secretary to Government of Gujarat, Home Department, on 27th of May, 2003. It is stated in para-2 of the affidavit that on 16.12.2002 the representation was preferred and received by the Home Department on 17.12.2002. It was processed by the detention section and papers were submitted to the Under Secretary (Land & Order) on 17.12.2002. The Under Secretary sent the representation to the Additional Secretary (Law and Order) which was received by the Additional Secretary on 18.12.2002 with the Under Secretary's noting. The Additional Secretary cleared the same on 18.12.2002 and forwarded the papers to the Addl. Chief Secretary (Home) on 18.12.2002. The Additional Chief Secretary (Home) cleared the file on 18.12.2002. On clearance from the Addl. Chief Secretary (Home), the file was sent to the Home Minister. Since results of General Elections of the Gujarat State Legislative Assembly were declared on 15.12.2002 and thereafter process of formation of New Government was going on, the Minister of State for Home had left his office as a Home Minister on account of process of formation of new Cabinet and was not available till 20.12.2002. The file was sent to the office of the Chief Minister on 21.12.2002 because the Chief Minister was repository of all the powers of the Cabinet at that juncture. It was public holiday on 22.12.2002 being Sunday. After due consideration, the Chief Minister decided to reject the said representation on 23.12.2002 and according to learned AGP therefore there was no delay in dealing with the representation. It is pertinent to refer herein again the contention of the learned Advocate for the petitioner based on the decisions of the Supreme Court in the case of RAJAMMAL vs. STATE OF TAMIL NADU, reported in AIR 1999 SC 684 wherein the Supreme Court observed that unexplained delay of 5 days in considering and disposing detenu's representation was fatal to the detention order. The reason for delay advanced in

disposing of the representation of the detenu in that context was the absence of minister at headquarters and, therefore, the file could not be attended. The Supreme Court observed that mere absence of Minister at headquarters is not sufficient to justify the delay.

13. Considering the main contention of delay in disposal of representation of the petitioner, the facts of the case again will have to be carefully scrutinised. The dates which are given in the affidavit revealing the factual data is not disputed. Now, the question is, was there unexplained delay in attending and disposing of the representation of the petitioner by the Government as contended. The above said case of Rajammal vs. State of T.N. (supra), relied upon by the petitioner, clearly lays down a law that though it is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay, the Supreme Court further also laid down the law that, that does not mean that the authority is preempted from explaining any delay which would have occasioned in the disposal of the representation. It was further observed that the court can certainly consider whether delay was occasioned due to permissible reasons or unavoidable causes. If the delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. The Supreme Court further observed that in other words, it is for the authority concerned to explain the delay, if any, in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned. In that particular case, the delay of 5 days on account of absence of Minister at headquarters was not considered to be sufficient explanation of delay by the Apex Court, but the Apex Court laid down that it is for the court to consider whether the delay was occasioned due to permissible reasons or unavoidable causes. Therefore, in the present case it is required to be examined that whether the delay caused is permissible delay or was the direct fruit of unavoidable causes. On going through the files and affidavit-in-reply, as mentioned above, it is clear that till 19th of December, 2002, the representation was dealt with on day-to-day basis. On 19.12.2002 the file containing representation was left with the office of the Home Minister, the situation had arisen that the results of General Elections to the State Legislative Assembly were declared on 15.12.2002, the process of formation of new Government was going on. The

Cabinet was not in existence. Only Chief Minister was holding the charge of the Government, that is to say, all departments of the Government. In affidavit, when it is said that the Minister of State for Home left his office and was not available, certainly means that the Office of Home Minister was vacant on that day because old Cabinet came to an end with the declaration of the results of general Election of the State Assembly and new Cabinet was till to be formed and the charge was with the Chief Minister who was repository of all the powers including the powers of Home Minister. With this, the facts must be borne in mind that the process of forming New Government was going on. New Ministry i.e. the Chief Minister sworn on 22.12.2002. 22.12.2002 Sunday was holiday. On 19.12.2002, as aforesaid, the Office of the Home Minister was not available on account of formation of New Government, and C.M. was holding as a care taker being repository of the powers of the Government, on swearing oath on 22.12.2002. Since there was no formation of New Cabinet there was no other alternative and imperative of circumstances to forward the file containing representation of the detenu to the Chief Minister who was sworn in on 22.12.2002. So the file was immediately placed before the Chief Minister being repository of the powers on 23.12.2002, the representation of the detenu came to be decided on the same day. If these facts are taken into consideration, in this perspective, one can hardly say that there was any delay on the part of the Government to deal with the representation of the petitioner. Let alone explaining the delay caused. These are not the circumstances, which by any stretch of reasoning, can be labelled as permissible delay, but this could only be unavoidable causes, not within the bounds and reach of the concerned authority. In these circumstances, one cannot come to the conclusion that the Government allowed the time to be passed and lapsed and it was permissible delay. In this respect the view of the Apex Court in concerned decision is required to be looked into. In the matter of RAJAPPA NEELAKANTAN vs. STATE OF T.N. & Ors., as reported in (2000) 7 SCC 144, a representation to the Central Government by the detenu reached to the COFEPOSA Unit of the Finance Department on 9th September 1999. The said representation came to be disposed of by the Central Government on 15.9.1999. In this respect, Government advanced a cause that September 03, 4 and 5 being government holidays, on 6.9.1999 there were heaps of mail which required sifting and sorting and consequently the representation came to be disposed of by the Government on 15.9.1999. This explanation came to be accepted by the Supreme Court and the Supreme Court observed that the

order passed, was not vitiated on that ground.

14. In the matter of JASBIR SINGH vs. LT. GOVERNOR, DELHI AND ORS., as reported in (1999) 4 SCC 228, in para 5, the Supreme Court observed that the representation made to the Government on 22.6.1994 came to be disposed of on 12.7.1995. The Supreme Court observed that there cannot be any inflexible rule that delay in considering the representation in all cases ipso facto would be sufficient to render the detention void. Though the reasonable explanation will depend upon the facts of each case, taking into consideration the affidavit-in-reply filed on behalf of the Government, the Supreme Court observed that there was no unusual delay in disposing of the representation. Therefore delay ipso facto in dealing with the representation preferred by the detenu is not fatal to the detention order in the present case. The court can always consider the causes of the delay. In this case, the time between 19th to 23 December was lapsed is narrated in the affidavit. When there was no government and when Chief Minister only took the Oath on 22.12.2002, in between, the office of the Home Minister was not available, the representation cannot be said to have been dealt with not promptly especially when right after swearing in on 22.12.2002, the file was placed to the Chief Minister on 23.12.2002 and was disposed of on the same day. The ground of delay in deciding the representation therefore is required to be negatived.

15. In this context, the offspring contention that the detenu i.e. Addl. Chief Secretary, Home Department, was required to consider the representation is concerned, from the file it is clear that the representation did reach upto the Addl. Chief Secretary, Home Department, the detaining authority. That apart , this is not a case similar to the case of Moosa Husein Sanghar vs. State of Gujarat (supra). The pleading of Special Civil Application, representation placed on record and the attending circumstances only indicate that the representation was made to the State Government and the State Government only and not the detaining authority. It is incidental that the Addl. Chief Secretary, Home Department, the detaining authority in this case, is a link of proper channel to the Home Minister. If the matter is placed to the anvil of logic, then it is apparent that had the Addl. Chief Secretary, Home Department, was not necessary link to the proper channel to the Home Ministry, it was impossible that the representation addressed by the petitioner to the Government would have reached at any time to the Addl.

Chief Secretary, Home Department, being the detaining authority because it was never addressed and preferred to the detaining authority. The contention arose only because when the representation travelled through the links of proper channel upto the Home Minister, it also passed through the Addl. Chief Secretary, Home Department of the State Government. Otherwise, there was no question at all that the representation would have at all been reached to the detaining authority because the same was never addressed or submitted to the detaining authority. Therefore, since the representation was addressed to the State Government (notice to be served through the Additional Chief Secretary, Home Department (Special), Sachivalaya, Gandhinagar), and it could not have reached at all to the detaining authority otherwise if the detaining authority had been different, the question of independent consideration of representation by the detaining authority would not have arisen at all in this case. In the case of Kamleshkumar Ishwardas Patel (supra), the Constitutional Bench also observed that the detaining authority was required to be considered the representation of the detenu when it is submitted to him while in the case of Moosa Husein Sanghar (supra) the representation was made to the Advisory Board through the Government and Government refused to consider the same on the ground that it was not addressed to it, the Apex Court observed that the Government was required to consider the representation because under Section 11, the Government was empowered to revoke the order. These are not circumstances in this case. Even if we peruse the papers as submitted by the respondent, it is clear that the Addl. Chief Secretary has in his capacity as link of proper channel to the Home Ministry did consider the representation of the detenu and rejected the same. He had agreed to the note proposed and placed by the Department and has signed in token of that, that could only be the indication and revelation of applying mind by the Addl. Chief Secretary (Home) to the representation submitted by the detenu petitioner. Therefore, either way, if we consider the representation is submitted to the State Government, there is no force in the contention of the petitioner. Even if we peruse and look at the facts of the case, it is clear that the Addl. Chief Secretary, Home Department and the detaining authority as well had an occasion to look into the representation of the detenu and after rejection he allowed the representation to travel beyond and upto the Home Minister. This was again necessary because representation was addressed to the State Government and intercepting the representation rejecting the same and returning the same to the detenu without

reaching the same to the Government would have violated right of detenu of effective representation. Both ways, there is no force in the contention that the representation since was not considered by the Additional Chief Secretary, Home Department, Detaining authority, the order is required to be set aside.

16. The last contention is in respect of the orders of the bail application and placing the material before the Screening Committee. The contention is the Screening Committee perused the material on 24.9.2002. Now, as per the contention of the petitioner, the detenu preferred bail application before the Chief Judicial Magistrate on 3.9.2002 which came to be rejected on the same day. The detenu preferred bail application before the City Sessions Court on 8.10.2002 which also came to be rejected, but the bail granted by the Chief Metropolitan Magistrate to the detenu on 23.10.2002 because the charge sheet could not be filed within prescribed period under Criminal Procedure Code. Now the contention is the rejection of bail application by the Sessions Court on 8.10.2002 and granting of bail by the Chief Metropolitan Magistrate Court on 23.10.2002 are the facts non-existed on 24.9.2002 when the Screening Committee recommended the detention of the petitioner on material placed before the Committee and, therefore, the order requires to be set aside because all the material was not placed before the Screening Committee.

17. The Screening Committee appears to have been formed as per the guidelines of the Central Government. It appears to be one more tier to safeguard the liberty of the citizens. Likewise courts of this country as always required, the Government also is conscious about the liberty of the citizens guaranteed under Article 22(5) of the Constitution of India. It appears that for the benevolent object, it might have been thought by the democratic government that it is better to have a decision of a body of persons than of a department or an officers of the department. It appears that therefore there are guidelines to place such matters before the Screening Committee. Undoubtedly, the Screening Committee is not a statutory body and requirement of law, but when one department takes a decision affecting the liberty of a citizen, it is always better that at pre-detention stage, the matter be scrutinized not by the Department only proposing the preventative detention action but by other bodies like Screening Committee. As seen from the fact, the Screening Committee consists of the persons from various departments but it is certain that the Screening Committee is neither equivalent to the

detaining authority nor a statutory body and requirement of law. The case would have been different if at all the materials and all the record is not placed before the detaining authority. The non-placing of the orders passed in October 2002 before the Screening Committee because it convened on 24.9.2002 must not have any effect on the order of detention or the subjective satisfaction arrived at by the detaining authority for the above said reasons, but the material as available on 24.9.2002 was scanned by more persons than one and the persons who were not the proposing authority and the detention was recommended. The detaining authority might or might not agree with the recommendation of the Screening Committee and the detaining authority would be required to reach the subjective satisfaction objectively from the files and materials placed before him. All these facts, in respect of granting and rejecting the bail were placed before the detaining authority and when detaining authority has arrived at the subjective satisfaction, the contention that granting and rejecting bail application in October were non-existent fact on 24.9.2002 before the Screening Committee must be negatived.

18. In this view of the matter, for the above reasons, this Application stands rejected. Rule is discharged.

(J.R. Vora, J.)

p.n.nair